



6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 344 and 390

RIN 3064- AE06

Removal of Transferred OTS Regulations Regarding Recordkeeping and Confirmation Requirements for Securities Transactions Effected by State Savings Associations and Other Amendments

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking, the Federal Deposit Insurance Corporation (“FDIC”) proposes to rescind and remove from the Code of Federal Regulations 12 CFR part 390, subpart K (“part 390, subpart K”), entitled “Recordkeeping and Confirmation Requirements for Securities Transactions.” This subpart was included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (“OTS”) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). With few exceptions addressed below, the requirements for State savings associations in part 390, subpart K, are substantively similar to those in FDIC’s 12 CFR part 344 (“part 344”), which also is entitled “Recordkeeping and Confirmation Requirements for Securities Transactions” and is applicable to State nonmember insured banks and foreign banks having an insured branch.

The FDIC proposes to amend the definition section of part 344 to clarifying that part 344 applies to all insured depository institutions, including State savings associations, for which the FDIC is the appropriate Federal banking agency. The FDIC also proposes to amend part 344 to increase the number of transactions that all FDIC-supervised institutions may effect on behalf of customers under the small transaction exception from certain of the recordkeeping requirements (“Small Transaction Exception”).

Upon removal of part 390, subpart K, and with the proposed changes to part 344, the recordkeeping and confirmation requirements for securities transactions for customers effected by all insured depository institutions for which the FDIC has been designated the appropriate federal banking agency will be found at part 344.

DATES: Comments must be received on or before [insert date 60 days after publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods:

- **FDIC Web Site:** <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the agency website.
- **FDIC E-mail:** Comments@fdic.gov. Include RIN #3064-AD82 on the subject line of the message.
- **FDIC Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- **Hand Delivery to FDIC:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, e-mail address, and telephone number(s) in your comment. Where appropriate, comments should include a short Executive Summary consisting of no more than five single-spaced pages. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to <http://www.fdic.gov/regulations/laws/federal/propose.html>, including any personal information provided. Paper copies of public comments may be requested from the Public Information Center by telephone at 1-877-275-3342 or 1-703-562-2200.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act

The Dodd-Frank Act¹ provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 12 U.S.C. 5301 *et seq.*

21, 2011, the transfer date established by section 311 of the Dodd-Frank Act, codified at 12 U.S.C. 5411, the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (“OCC”), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (“FRB”), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(b), provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(c), further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations which would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC’s Board of Directors approved a “List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.²

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act, codified at 12 U.S.C. 5412(b)(2)(B)(i)(II), granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing

² 76 FR 39247 (July 6, 2011).

authority to issue regulations under the FDI Act and other laws as the “appropriate Federal banking agency” or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended the definition of “appropriate Federal banking agency” contained in section 3(q) of the FDI Act, 12 U.S.C. 1813(q), to add State savings associations to the list of entities for which the FDIC is designated as the “appropriate Federal banking agency.” As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations, as well as for State nonmember banks and insured branches of foreign banks.

As noted, on June 14, 2011, operating pursuant to this authority, the FDIC’s Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.³ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

One of the OTS’s rules transferred to the FDIC governs recordkeeping and confirmation requirements for securities transactions effected for customers by State savings associations. The OTS’s rule, formerly found at 12 CFR part 551, was transferred to the FDIC with only nomenclature changes and is now found in the FDIC’s rules at part 390, subpart K, entitled *Recordkeeping and Confirmation Requirements for*

³ 76 FR 47652 (Aug. 5, 2011).

Securities Transactions. Before the transfer of the OTS rules and continuing today, the FDIC's rules contained part 344, entitled *Recordkeeping and Confirmation Requirements for Securities Transactions*, a rule governing recordkeeping and confirmation requirements for securities transactions effected for customers by State nonmember insured banks and insured branches of foreign banks. After careful review and comparison of part 390, subpart K, and part 344, the FDIC proposes to rescind part 390, subpart K, because, as discussed below, it is substantively redundant to existing part 344.

Further to clarify that part 344 applies to all insured depository institutions for which the FDIC has been designated the appropriate Federal banking agency, the FDIC proposes to amend section 344.3 of part 344 to remove the definition of "bank" and add the definition of "FDIC-supervised institution" to the list of defined words. This term and its plural form would replace "bank," "banks," "state nonmember insured bank (except a District bank)" and "foreign bank having an insured branch" throughout part 344. The FDIC also proposes to amend section 344.2(a)(1) of part 344 to increase the threshold, from 200 transactions to 500 transactions, for the Small Transaction Exception from certain of the provisions of part 344 related to maintaining account records, order tickets, and broker-dealer records, and written securities trading policies and procedures.

FDIC's Existing 12 CFR Part 344

In response to recommendations contained in the *Final Report of the Securities and Exchange Commission on Bank Securities Activities* (June 1977), the FDIC in 1979 adopted part 344 to require banks under its jurisdiction to establish uniform procedures for recordkeeping and confirmation requirements with respect to effecting securities

transactions for customers.⁴ The purpose of part 344 was two-fold: (1) to ensure that bank customers purchasing securities received adequate information regarding the transaction, and (2) to ensure that the banks maintain adequate records and controls with respect to securities transactions. The FDIC patterned part 344 off of then-existing Securities and Exchange Commission (“SEC”) rules applicable to broker-dealers. At the same time, the FRB and OCC adopted regulations, respectively, substantially similar as part 344 with one minor qualification.⁵ The only difference among the FDIC’s, FRB’s and OCC’s (collectively, the “Agencies”) original final rules was that the OCC included a provision permitting the Comptroller of the Currency to waive any recordkeeping and confirmation requirements in appropriate circumstance.⁶

As noted, the Agencies’ rules otherwise were substantively similar. For example, each of the Agencies included a Small Transaction Exception, which is an exception from certain requirements related to maintaining account records, order tickets, and broker/dealer records, and written securities trading policies and procedures for banks having an average of fewer than 200 securities transactions for customers per calendar year over the prior three calendar year period. This exception was promulgated in response to public comment during the Agencies’ respective rulemaking processes and is “in consideration of those comments expressing the view that recordkeeping requirements should be less onerous for smaller banks.”⁷ During its rulemaking process, the FDIC proposed a 50-transaction threshold but ultimately adopted the 200-transaction

⁴ 44 FR 43260, 43261 (July 24, 1979).

⁵ See 44 FR 43252 (July 24, 1979) (OCC’s rule); 44 FR 43256 July 24, 1979) (FRB’s rule).

⁶ 44 FR at 43256.

⁷ 43 FR 51638 (Nov. 6, 1978).

threshold of the current Small Transaction Exception to align the rule with the OCC's and FRB's rules, respectively.⁸

Over time, the FDIC amended part 344 to improve efficiency, reflect market developments, and to be consistent with regulatory changes made by other regulators that affect requirements for recordkeeping and confirmation of securities transactions effected for customers by banks.⁹ For example, the FDIC in 1995 adopted an amendment to Part 344 to add express authority for the FDIC's Board of Directors to waive any provision of the part for good cause shown.¹⁰ The other Agencies also amended their rules, respectively, over the course of time to improve efficiency and reflect market developments. As a result, the Agencies' rules remain substantially similar although not identical. For example, the OCC's rule also includes an interpretation clarifying that national banks may satisfy notification requirements electronically, but neither the FRB nor the FDIC has expressly adopted such clarification.¹¹ However, this distinction is no longer germane in light of the Electronic Signatures in Global National Commerce Act,¹² which provides a general rule of validity for electronic records and signatures for transactions in or affecting interstate or foreign commerce.

Former OTS's 12 CFR Part 551 (transferred to FDIC's Part 390, Subpart K)

In 2002, the OTS adopted 12 CFR part 551 as a final rule governing recordkeeping and confirmation requirements for securities transactions effected by State and Federal savings associations based on the Agencies' recordkeeping and confirmation

⁸ 43 FR at 51638; *see* 44 FR at 43263.

⁹ *See* 72 FR 60546 (Oct. 25, 2007); 62 FR 9915 (Mar. 5, 1997); 60 FR 7111 (Feb. 7, 1995); 45 FR 12775 (Feb. 27, 1980).

¹⁰ 60 FR at 7111.

¹¹ 61 FR 63958, 63956 (Dec. 2, 1996).

¹² Pub. L. 106-229, 114 Stat. 464 (2000).

regulations.¹³ However, it made modifications to reflect SEC requirements for registered broker-dealers, investment companies and investment advisors. For example, OTS's part 551 contained a small transaction exception from the general recordkeeping and confirmation requirements savings associations that effected an average of 500 or fewer transactions for customers per year over the three prior calendar years.¹⁴ In its final rule, the OTS noted that it based the 500-transaction threshold of this exception on the de minimis exception for banks from being deemed a "broker" under the SEC's definition in section 3(a)(4) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78c(a)(4)(B)(xi), as amended by Section 201 of the Gramm-Leach-Bliley Act of 1999¹⁵ (the "GLB Act").¹⁶ Briefly, the GLB Act amended the definition of "broker" in the Exchange Act to exclude specified bank securities activities from such definition.¹⁷ It also added a de minimis exception that permits banks to effect not more than 500 securities transactions for customers in any calendar year without being considered a broker under the Exchange Act.¹⁸ Under the Exchange Act, State savings associations are included in the definition of "bank."¹⁹

In addition, the OTS's part 551 required that savings associations that maintain and preserve records via micrographic and electronic storage do so in a manner consistent with the SEC's requirements for registered investment companies and investment

¹³ 67 FR 76293, 76299 (Dec. 12, 2002); *see* 67 FR 39886 (June 11, 2002).

¹⁴ 12 CFR 551.20(b)(1).

¹⁵ Pub. L. 106-102, 113 Stat. 1338, 1385 (1999).

¹⁶ 67 FR 39886, 39887 (June 11, 2002).

¹⁷ 15 U.S.C. 78c(a)(4)(B)(i)-(xi).

¹⁸ 15 U.S.C. 78c(a)(4)(B)(xi). By SEC rules, the 500-transaction limit of the de minimis exception applies to the combined total number of bank broker transactions and dealer riskless principal transactions. *See* 17 CFR 240.3a5-1.

¹⁹ 15 U.S.C. 78c(a)(6).

advisors.²⁰ This provision required, among other things, that the savings association or the person maintaining records on its behalf, arrange and index the records in a certain manner and separately store the original record from a duplicative copy of the record.²¹

With respect to the OTS's requirements related to micrographic and electronic storage of records that were transferred to part 390, subpart K, section 390.205(b), while not required by the FDIC's part 344, these provisions are largely outdated and unnecessary in light of the current industry practice of utilizing and storing electronic records in a manner consistent with the SEC's guidelines, especially regarding indexing records and maintaining backup records. Further the Agencies have specific interagency policies relating to backing up electronic records.²² Accordingly, the FDIC sees no need to impose these requirements on all FDIC-supervised institutions at this point but solicits specific commentary on whether any existing provision of Part 344 is outdated or unnecessary in light of industry practice or technological advances.

Despite the differences addressed above and minor technical nuances,²³ the OTS's rule was otherwise substantively similar to the Agencies' recordkeeping and confirmation rules, including the FDIC's part 344. After careful comparison of the FDIC's part 344 that existed before the OTS rules were transferred with the transferred OTS rule on recordkeeping and confirmation requirements for securities transactions, the FDIC has concluded that the transferred OTS rules found at part 390, subpart K, are substantively redundant. Therefore, based on the above, the FDIC proposes to rescind and remove from the Code of Federal Regulations the rules located at Part 390, Subpart K.

²⁰ 67 FR at 39887; *see* 17 CFR 270.31a-2(f); 17 CFR 275.204-2(g).

²¹ 12 CFR 390.205; *see* 12 CFR 551.60 (2011).

²² *See* Fed. Fin. Inst. Examination Council, IT Examination Handbook: Information Security (2006), *available at* <http://ithandbook.ffeic.gov/it-booklets.aspx>.

²³ Most notably, the OTS's part 551 divided recordkeeping and confirmation requirements into separate subparts; titled each section of text in question-and-answer format; and included descriptive charts.

Additionally, the FDIC recognizes that some State savings associations availed themselves of the small transaction exception in OTS's 12 CFR part 551 from certain recordkeeping and written policies and procedures requirements if effecting and average of 500 or fewer transactions for customers per year over a three calendar year period. This provision was transferred to section 390.201(b)(1) of part 390, subpart K. The threshold of FDIC's Small Transaction Exception in part 344 has been limited to 200 securities transactions since 1979, even though bank securities activities have increased over the past three decades. In 1999, Congress recognized the increase in bank securities activities when it enacted Title II of the GLB Act to carve out certain bank securities activities from the Exchange Act's definition of "broker," including the de minimis exception for banks effecting not more than 500 transactions in a calendar year. As such, it is appropriate now for the FDIC to propose increasing, from 200 transactions to 500 transactions, the threshold for all FDIC-supervised institutions availing themselves of the Small Transaction Exception in Part 344. This action would ensure parity for recordkeeping and confirmation purposes for State savings associations and all other FDIC-supervised institutions bound by part 344.

II. The Proposal

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act, 12 U.S.C. 5414(b)(3), in pertinent part, provides that the former OTS's regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules currently found in part 390, subpart K, the FDIC, as the appropriate

federal banking agency for State savings associations, proposes to rescind part 390, subpart K, in its entirety. The FDIC also proposes to amend section 344.3 to remove “bank” from the list of defined terms and to add the definition of “FDIC-supervised institution” to this list. “FDIC-supervised institution” would mean any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q). Under the Proposal, the term “FDIC-supervised institution” and its plural form would replace “bank,” “banks,” “state nonmember insured bank (except a District bank)” and “foreign bank(s) having an insured branch” throughout part 344. If the proposal is finalized, the recordkeeping and confirmation requirements in part 344 would apply to all FDIC-supervised institutions that effect securities transactions for customers, and part 390, subpart K would be removed because it is largely redundant of those rules found in part 344. Rescinding part 390, subpart K, will serve to streamline the FDIC’s rules and eliminate unnecessary regulations.

In addition, the FDIC proposes to amend section 344.2(a)(1) to raise the threshold for the Small Transaction Exception applicable to all FDIC-supervised institutions effecting securities transactions for customers, from 200 transactions to 500 transactions, per calendar year over the prior three calendar year period.

III. Request for Comments

The FDIC invites comments on all aspects of this proposed rulemaking, and specifically requests comments on the following:

1.) Are there any specific provisions of part 344 that are technologically outdated or obsolete, or are behind industry standards? If so, please describe and recommend alternate recordkeeping methodology.

2.) Are the provisions of the proposed part 344 sufficient to provide consistent and effective recordkeeping and confirmation requirements for all FDIC-supervised institutions? Please substantiate your answer.

3.) What impacts, positive or negative, can you foresee in the FDIC's proposal to rescind part 390, subpart K?

Written comments must be received by the FDIC no later than [insert date 60 days after publication in the FEDERAL REGISTER].

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act ("PRA") of 1995 (44 U.S.C. 3501-3521), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number.

The Proposed Rule would rescind and remove from FDIC regulations part 390, subpart K. This rule was transferred with only nominal changes to the FDIC from the OTS when the OTS was abolished by Title III of the Dodd-Frank Act. Part 390, subpart K, is largely redundant of the FDIC's existing Part 344 regarding recordkeeping and confirmation requirements effected by State nonmember banks and insured branches of foreign banks. The information collections contained in part 344 are cleared by OMB

under the FDIC's "Recordkeeping and Confirmation Requirements for Securities Transactions" information collection (OMB No. 3064-0028). The FDIC's burden estimates were updated in connection with the collection's 2012 renewal to include State savings associations transferred from the OTS to the FDIC. Thus, this provision of the Proposed Rule will not involve any new collections of information pursuant to the PRA.

Further, with regard to part 344, the Proposed Rule would amend section 344.2(a)(1) to increase the threshold, from 200 transactions to 500 transactions per calendar year over the prior three calendar year period, for the Small Transaction Exception from certain of the recordkeeping requirements applicable to all FDIC-supervised insured depository institutions. The effect of the increased threshold will be to increase the number of institutions that are exempt from more elaborate recordkeeping requirements in part 344 and from the need to have written management policies and operational procedures. However, the FDIC's burden calculations are based on an estimated average response time across all supervised institutions. Therefore, the nominal increase in exempted institutions will have no significant impact on overall current burden estimates. As such, this provision of the Proposed Rule will not involve any new collections of information under the PRA.

Finally, the Proposed Rule would amend section 344.3 to remove the definition of "bank" from the list of defined terms and add the definition of "FDIC-supervised institution." This measure is to clarify throughout Part 344 that State savings associations, as well as State nonmember insured banks and foreign banks having insured branches are all subject to part 344. Thus, this provision of the Proposed Rule will not

involve any new collections of information under the PRA or impact current burden estimates.

Based on the above, no information collection request has been submitted to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”), requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to \$500 million).²⁴ However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the Federal Register together with the rule. For the reasons provided below, the FDIC certifies that the Proposed Rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

As discussed in this notice of proposed rulemaking, part 390, subpart K, was transferred from OTS’s part 551, which governed recordkeeping and confirmation requirements for Federal and State savings associations that effect securities transactions for customers. OTS’s part 551 had been in effect since 2002, and all State savings associations were required to comply with it. Because it is redundant of existing part 344

²⁴ 5 U.S.C. 601 *et seq.*

of the FDIC's Rules, the FDIC proposes rescinding and removing part 390, subpart K. As a result, all FDIC-supervised institutions—including State savings associations—would be required to comply with part 344 if they effect securities transactions for customers. Because all State savings associations have been required to comply with substantially similar recordkeeping and confirmation rules when they effected securities transactions for customers since 2002, today's Proposal would have no significant economic impact on any State savings association.

Further, the Proposal would amend section 344.2(a)(1) to increase the threshold for all FDIC-supervised institutions relying on the Small Transaction Exception from 200 to 500 transactions for customers per calendar year over the prior three calendar year period. As State savings associations currently comply with a 500-transaction small transaction threshold, the only impact of this portion of the proposal would be to exempt more State nonmember insured banks and foreign banks having insured branches from complying with certain recordkeeping and written policy and procedure requirements, thus reducing regulatory burden for these insured depository institutions. There is no existing data that is helpful in determining how many State nonmember insured banks and foreign banks having insured branches that transact on average between 201 and 500 transactions for customers per calendar year over the prior three calendar year period would take advantage of an increased transaction threshold for the FDIC's Small Transaction Exception. Nevertheless, if the Proposal reduces recordkeeping and written policy procedure requirements for any insured depository institutions, there still would be no significant economic impact on a substantial number of small entities.

C. Plain Language

Section 722 of the GLB Act, codified at 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC invites comments on whether the Proposed Rule is clearly stated and effectively organized, and how the FDIC might make it easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?
- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (“EGRPRA”), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.²⁵ The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the

²⁵ Pub. L. 104-208 (Sept. 30, 1996).

next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently under way. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. If you provide such comments, please be specific and provide alternatives whenever appropriate.

List of Subjects

12 CFR Part 344

Banks, banking; Reporting and recordkeeping requirements; Savings associations.

12 CFR Part 390

Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend parts 344 and 390 of title 12 of the Code of Federal Regulations as set forth below:

1. Revise part 344 to read as follows:

PART 344—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

Sec.

344.1 Purpose and scope.

344.2 Exceptions.

344.3 Definitions.

344.4 Recordkeeping.

344.5 Content and time of notification.

344.6 Notification by agreement; alternative forms and times of notification.

344.7 Settlement of securities transactions.

344.8 Securities trading policies and procedures.

344.9 Personal securities trading reporting by officers and employees of FDIC-supervised institutions.

344.10 Waivers.

Authority: 12 U.S.C. 1817, 1818, 1819, and 5412.

§ 344.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to ensure that purchasers of securities in transactions effected by FDIC-supervised institutions are provided adequate information regarding transactions. This part is also designed to ensure that FDIC-supervised institutions subject to this part maintain adequate records and controls with respect to the securities transactions they effect.

(b) *Scope; general.* Any security transaction effected for a customer by an FDIC-supervised institution is subject to this part unless excepted by § 344.2. An FDIC-supervised institution effecting transactions in government securities is subject to the notification, recordkeeping, and policies and procedures requirements of this part. This part also applies to municipal securities transactions by an FDIC-supervised institution that is not registered as a "municipal securities dealer" with the Securities and Exchange Commission. *See* 15 U.S.C. 78c(a)(30) and 78o--4.

§ 344.2 Exceptions.

(a) An FDIC-supervised institution effecting securities transactions for customers is not subject to all or part of this part 344 to the extent that they qualify for one or more of the following exceptions:

(1) *Small number of transactions.* The requirements of §§ 344.4(a)(2) through (4) and 344.8(a)(1) through (3) do not apply to an FDIC-supervised institution effecting an average of fewer than 500 securities transactions per year for customers over the prior three calendar year period. The calculation of this average does not include transactions in government securities.

(2) *Government securities.* The recordkeeping requirements of § 344.4 do not apply to FDIC-supervised institutions effecting fewer than 500 government securities brokerage transactions per year. This exemption does not apply to government securities dealer transactions by FDIC-supervised institutions.

(3) *Municipal securities.* This part does not apply to transactions in municipal securities effected by an FDIC-supervised institution registered with the Securities and Exchange Commission as a "municipal securities dealer" as defined in title 15 U.S.C. 78c(a)(30). See 15 U.S.C. 78o--4.

(4) *Foreign branches.* Activities of foreign branches of FDIC-supervised institutions shall not be subject to the requirements of this part.

(5) *Transactions effected by registered broker/dealers.* (i) This part does not apply to securities transactions effected for an FDIC-supervised institution's customer by a registered broker/dealer if:

(A) The broker/dealer is fully disclosed to the customer; and

(B) The customer has a direct contractual agreement with the broker/dealer.

(ii) This exemption extends to arrangements with broker/dealers which involve FDIC-supervised institution employees when acting as employees of, and subject to the supervision of, the registered broker/dealer when soliciting, recommending, or effecting securities transactions.

(b) *Safe and sound operations.* Notwithstanding this section, every FDIC-supervised institution effecting securities transactions for customers shall maintain, directly or indirectly, effective systems of records and controls regarding their customer securities transactions to ensure safe and sound operations. The records and systems maintained must clearly and accurately reflect the information required under this part and provide an adequate basis for an audit.

§ 344.3 Definitions.

(a) *Asset-backed security* means a security that is serviced primarily by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

(b) *Cash management sweep account* means a prearranged, automatic transfer of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

(c) *Collective investment fund* means funds held by an FDIC-supervised institution as fiduciary and, consistent with local law, invested collectively:

(1) In a common trust fund maintained by such FDIC-supervised institution exclusively for the collective investment and reinvestment of monies contributed thereto by the FDIC-supervised institution in its capacity as trustee, executor, administrator, guardian, or custodian under the Uniform Gifts to Minors Act; or

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or similar trusts which are exempt from Federal income taxation under the Internal Revenue Code (26 U.S.C.).

(d) *Completion of the transaction* means:

(1) For purchase transactions, the time when the customer pays the FDIC-supervised institution any part of the purchase price (or the time when the FDIC-supervised institution makes the book-entry for any part of the purchase price, if applicable), however, if the customer pays for the security prior to the time payment is requested or becomes due, then the transaction shall be completed when the FDIC-supervised institution transfers the security into the account of the customer; and

(2) For sale transactions, the time when the FDIC-supervised institution transfers the security out of the account of the customer or, if the security is not in its custody, then the time when the security is delivered to it, however, if the customer delivers the security to the FDIC-supervised institution prior to the time delivery is requested or becomes due then the transaction shall be completed when the FDIC-supervised institution makes payment into the account of the customer.

(e) *Crossing of buy and sell orders* means a security transaction in which the same FDIC-supervised institution acts as agent for both the buyer and the seller.

(f) *Customer* means any person or account, including any agency, trust, estate, guardianship, or other fiduciary account for which an FDIC-supervised institution effects or participates in effecting the purchase or sale of securities, but does not include a broker, dealer, insured depository institution acting as a broker or a dealer, issuer of the securities that are the subject of the transaction or a person or account having a direct, contractual agreement with a fully disclosed broker/dealer.

(g) *Debt security* means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security) and fractional or participation interests in one or more of any of the foregoing; provided, however, that securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a--1 et seq., shall not be included in this definition.

(h) *FDIC-supervised institution* means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

(i) *Government security* means:

(1) A security that is a direct obligation of, or obligation guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest and which is designated by the Secretary of the Treasury

for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by any corporation whose securities are designated, by statute specifically naming the corporation, to constitute exempt securities within the meaning of the laws administered by the Securities and Exchange Commission; or

(4) Any put, call, straddle, option, or privilege on a security described in paragraph (i)(1), (2), or (3) of this section other than a put, call, straddle, option, or privilege that is traded on one or more national securities exchanges, or for which quotations are disseminated through an automated quotation system operated by a registered securities association.

(j) *Investment discretion* means that, with respect to an account, an FDIC-supervised institution directly or indirectly:

(1) Is authorized to determine what securities or other property shall be purchased or sold by or for the account; or

(2) Makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for these investment decisions.

(k) *Municipal security* means a security which is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision, or any municipal corporate instrumentality of one or more States or any security which is an industrial development bond (as defined in 26 U.S.C. 103(c)(2)) the interest on which is excludable

from gross income under 26 U.S.C. 103(a)(1) if, by reason of the application of paragraph (4) or (6) of 26 U.S.C. 103(c) (determined as if paragraphs (4)(A), (5) and (7) were not included in 26 U.S.C. 103(c), paragraph (1) of 26 U.S.C. 103(c) does not apply to such security. *See* 15. U.S.C. 78c(a)(29).

(l) *Periodic plan* means any written authorization for an FDIC-supervised institution to act as agent to purchase or sell for a customer a specific security or securities, in a specific amount (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and setting forth the commission or charges to be paid by the customer or the manner of calculating them. Periodic plans include dividend reinvestment plans, automatic investment plans, and employee stock purchase plans.

(m) *Security* means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, and any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing. The term security does not include:

- (1) A deposit or share account in a federally or state insured depository institution;
- (2) A loan participation;

- (3) A letter of credit or other form of insured depository institution indebtedness incurred in the ordinary course of business;
- (4) Currency;
- (5) Any note, draft, bill of exchange, or bankers acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;
- (6) Units of a collective investment fund;
- (7) Interests in a variable amount (master) note of a borrower of prime credit; or
- (8) U.S. Savings Bonds.

§ 344.4 Recordkeeping.

(a) *General rule.* An FDIC-supervised institution effecting securities transactions for customers shall maintain the following records for at least three years:

(1) *Chronological records.* An itemized daily record of each purchase and sale of securities maintained in chronological order, and including:

- (i) Account or customer name for which each transaction was effected;
- (ii) Description of the securities;
- (iii) Unit and aggregate purchase or sale price;
- (iv) Trade date; and
- (v) Name or other designation of the broker/dealer or other person from whom the securities were purchased or to whom the securities were sold;

(2) *Account records.* Account records for each customer, reflecting:

- (i) Purchases and sales of securities;

- (ii) Receipts and deliveries of securities;
 - (iii) Receipts and disbursements of cash; and
 - (iv) Other debits and credits pertaining to transactions in securities;
- (3) *A separate memorandum (order ticket)* of each order to purchase or sell securities (whether executed or canceled), which shall include:
- (i) The accounts for which the transaction was effected;
 - (ii) Whether the transaction was a market order, limit order, or subject to special instructions;
 - (iii) The time the order was received by the trader or other FDIC-supervised institution employee responsible for effecting the transaction;
 - (iv) The time the order was placed with the broker/dealer, or if there was no broker/dealer, time the order was executed or canceled;
 - (v) The price at which the order was executed; and
 - (vi) The broker/dealer utilized;
- (4) *Record of broker/dealers.* A record of all broker/dealers selected by the FDIC-supervised institution to effect securities transactions and the amount of commissions paid or allocated to each broker during the calendar year; and
- (5) *Notifications.* A copy of the written notification required by §§ 344.5 and 344.6.
- (b) *Manner of maintenance.* Records may be maintained in whatever manner, form or format an FDIC-supervised institution deems appropriate, provided however, the records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Records may be maintained in hard copy, automated or electronic form provided the records are easily retrievable,

readily available for inspection, and capable of being reproduced in a hard copy. An FDIC-supervised institution may contract with third party service providers, including broker/dealers, to maintain records required under this part.

§ 344.5 Content and time of notification.

Every FDIC-supervised institution effecting a securities transaction for a customer shall give or send, by mail, facsimile or other means of electronic transmission, to the customer at or before completion of the transaction one of the types of written notification identified below:

(a) *Broker/dealer's confirmations.* (1) A copy of the confirmation of a broker/dealer relating to the securities transaction. An FDIC-supervised institution may either have the broker/dealer send the confirmation directly to the FDIC-supervised institution's customer or send a copy of the broker/dealer's confirmation to the customer upon receipt of the confirmation by the FDIC-supervised institution. If an FDIC-supervised institution chooses to send a copy of the broker/dealer's confirmation, it must be sent within one business day from the institution's receipt of the broker/dealer's confirmation; and (2) If the FDIC-supervised institution is to receive remuneration from the customer or any other source in connection with the transaction, a statement of the source and amount of any remuneration to be received if such would be required under paragraph (b)(6) of this section; or

(b) *Written notification.* A written notification disclosing:

- (1) Name of the FDIC-supervised institution;
- (2) Name of the customer;

(3) Whether the FDIC-supervised institution is acting as agent for such customer, as agent for both such customer and some other person, as principal for its own account, or in any other capacity;

(4) The date and time of execution, or the fact that the time of execution will be furnished within a reasonable time upon written request of the customer, and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security purchased or sold by the customer;

(5) The amount of any remuneration received or to be received, directly or indirectly, by any broker/dealer from such customer in connection with the transaction;

(6)(i) The amount of any remuneration received or to be received by the FDIC-supervised institution from the customer, and the source and amount of any other remuneration received or to be received by the FDIC-supervised institution in connection with the transaction, unless:

(A) Remuneration is determined pursuant to a prior written agreement between the FDIC-supervised institution and the customer; or

(B) In the case of government securities and municipal securities, the FDIC-supervised institution received the remuneration in other than an agency transaction; or

(C) In the case of open end investment company securities, the FDIC-supervised institution has provided the customer with a current prospectus which discloses all current fees, loads and expenses at or before completion of the transaction;

(ii) If the FDIC-supervised institution elects not to disclose the source and amount of remuneration it has or will receive from a party other than the customer pursuant to paragraph (b)(6)(i)(A), (B), or (C) of this section, the written notification must disclose

whether the FDIC-supervised institution has received or will receive remuneration from a party other than the customer, and that the FDIC-supervised institution will furnish within a reasonable time the source and amount of this remuneration upon written request of the customer. This election is not available, however, if, with respect to a purchase, the FDIC-supervised institution was participating in a distribution of that security; or, with respect to a sale, the FDIC-supervised institution was participating in a tender offer for that security;

(7) Name of the broker/dealer utilized; or where there is no broker/dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that the FDIC-supervised institution will furnish this information within a reasonable time upon written request;

(8) In the case of a transaction in a debt security subject to redemption before maturity, a statement to the effect that the debt security may be redeemed in whole or in part before maturity, that the redemption could affect the yield represented and that additional information is available upon request;

(9) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price:

(i) The dollar price at which the transaction was effected; and

(ii) The yield to maturity calculated from the dollar price, provided however, that this shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer thereof, with a variable interest payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(10) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and call price;

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield; provided however, that this paragraph (b)(10) shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer with a variable interest rate payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(11) In the case of a transaction in a debt security that is an asset-backed security, which represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment, a statement indicating that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid and a statement of the fact that information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) will be furnished upon written request of the customer; and

(12) In the case of a transaction in a debt security, other than a government security, that the security is unrated by a nationally recognized statistical rating organization, if that is the case.

§ 344.6 Notification by agreement; alternative forms and times of notification.

An FDIC-supervised institution may elect to use the following alternative notification procedures if the transaction is effected for:

(a) *Notification by agreement.* Accounts (except periodic plans) where the FDIC-supervised institution does not exercise investment discretion and the FDIC-supervised institution and the customer agree in writing to a different arrangement as to the time and content of the written notification; provided however, that such agreement makes clear the customer's right to receive the written notification pursuant to § 344.5 (a) or (b) at no additional cost to the customer.

(b) *Trust accounts.* Accounts (except collective investment funds) where the FDIC-supervised institution exercises investment discretion in other than in an agency capacity, in which instance it shall, upon request of the person having the power to terminate the account or, if there is no such person, upon the request of any person holding a vested beneficial interest in such account, give or send to such person the written notification within a reasonable time. The FDIC-supervised institution may charge such person a reasonable fee for providing this information.

(c) *Agency accounts.* Accounts where the FDIC-supervised institution exercises investment discretion in an agency capacity, in which instance:

(1) The FDIC-supervised institution shall give or send to each customer not less frequently than once every three months an itemized statement which shall specify the funds and securities in the custody or possession of the FDIC-supervised institution at the

end of such period and all debits, credits and transactions in the customer's accounts during such period; and

(2) If requested by the customer, the FDIC-supervised institution shall give or send to each customer within a reasonable time the written notification described in § 344.5. The FDIC-supervised institution may charge a reasonable fee for providing the information described in § 344.5.

(d) *Cash management sweep accounts.* An FDIC-supervised institution effecting a securities transaction for a cash management sweep account shall give or send its customer a written statement, in the same form as required under paragraph (f) of this section, for each month in which a purchase or sale of a security takes place in the account and not less than once every three months if there are no securities transactions in the account. Notwithstanding the provisions of this paragraph (d), FDIC-supervised institutions that retain custody of government securities that are the subject of a hold-in-custody repurchase agreement are subject to the requirements of 17 CFR 403.5(d).

(e) *Collective investment fund accounts.* The FDIC-supervised institution shall at least annually give or send to the customer a copy of a financial report of the fund, or provide notice that a copy of such report is available and will be furnished upon request to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. This report shall be based upon an audit made by independent public accountants or internal auditors responsible only to the board of directors of the FDIC-supervised institution.

(f) *Periodic plan accounts.* The FDIC-supervised institution shall give or send to the customer not less than once every three months a written statement showing:

- (1) The funds and securities in the custody or possession of the FDIC-supervised institution;
- (2) All service charges and commissions paid by the customer in connection with the transaction; and
- (3) All other debits and credits of the customer's account involved in the transaction; provided that upon written request of the customer, the FDIC-supervised institution shall give or send the information described in § 344.5, except that any such information relating to remuneration paid in connection with the transaction need not be provided to the customer when the remuneration is paid by a source other than the customer. The FDIC-supervised institution may charge a reasonable fee for providing information described in § 344.5.

§ 344.7 Settlement of securities transactions.

- (a) An FDIC-supervised institution shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security as defined in 15 U.S.C. 78c(a)(12), government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.
- (b) Paragraphs (a) and (c) of this section shall not apply to contracts:
 - (1) For the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association; or

(2) For the purchase or sale of securities that the Securities and Exchange Commission (SEC) may from time to time, taking into account then existing market practices, exempt by order from the requirements of paragraph (a) of SEC Rule 15c6--1, 17 CFR 240.15c6--1(a), either unconditionally or on specified terms and conditions, if the SEC determines that an exemption is consistent with the public interest and the protection of investors.

(c) Paragraph (a) of this section shall not apply to contracts for the sale for cash of securities that are priced after 4:30 p.m. Eastern time on the date the securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a et seq., or sold to an initial purchaser by an FDIC-supervised institution participating in the offering. An FDIC-supervised institution shall not effect or enter into a contract for the purchase or sale of the securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(d) For the purposes of paragraphs (a) and (c) of this section, the parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to the date for all securities sold pursuant to the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

§ 344.8 Securities trading policies and procedures.

(a) *Policies and procedures.* Every FDIC-supervised institution effecting securities transactions for customers shall establish written policies and procedures providing:

(1) Assignment of responsibility for supervision of all officers or employees who:

(i) Transmit orders to or place orders with broker/dealers; or

(ii) Execute transactions in securities for customers;

(2) Assignment of responsibility for supervision and reporting, separate from those in paragraph (a)(1) of this section, with respect to all officers or employees who process orders for notification or settlement purposes, or perform other back office functions with respect to securities transactions effected for customers;

(3) For the fair and equitable allocation of securities and prices to accounts when orders for the same security are received at approximately the same time and are placed for execution either individually or in combination; and

(4) Where applicable, and where permissible under local law, for the crossing of buy and sell orders on a fair and equitable basis to the parties to the transaction.

(b) [Reserved]

§ 344.9 Personal securities trading reporting by bank officers and employees.

(a) *Officers and employees subject to reporting.* FDIC-supervised institution officers and employees who:

(1) Make investment recommendations or decisions for the accounts of customers;

(2) Participate in the determination of such recommendations or decisions; or

(3) In connection with their duties, obtain information concerning which securities are being purchased or sold or recommend such action, must report to the FDIC-supervised

institution, within 30-calendar days after the end of the calendar quarter, all transactions in securities made by them or on their behalf, either at the FDIC-supervised institution or elsewhere in which they have a beneficial interest. The report shall identify the securities purchased or sold and indicate the dates of the transactions and whether the transactions were purchases or sales.

(b) *Exempt transactions.* Excluded from this reporting requirement are:

- (1) Transactions for the benefit of the officer or employee over which the officer or employee has no direct or indirect influence or control;
- (2) Transactions in registered investment company shares;
- (3) Transactions in government securities; and
- (4) All transactions involving in the aggregate \$10,000 or less during the calendar quarter.

(c) *Alternative report.* Where an FDIC-supervised institution acts as an investment adviser to an investment company registered under the Investment Company Act of 1940, the FDIC-supervised institution's officers and employees may fulfill their reporting requirement under paragraph (a) of this section by filing with the FDIC-supervised institution the "access persons" personal securities trading report required by SEC Rule 17j--1, 17 CFR 270.17j-1.

§ 344.10 Waivers.

The Board of Directors of the FDIC, in its discretion, may waive for good cause all or any part of this part 344.

**PART 390 -- REGULATIONS TRANSFERRED FROM THE OFFICE OF
THRIFT SUPERVISION**

2. The authority citation for part 390 is amended by removing the additional authority for subpart K.

AUTHORITY: 12 U.S.C. 1819.

* * * * *

Subpart K – [Removed and Reserved]

3. Remove and reserve subpart K, consisting of §§ 390.200 through 390.255.

Dated at Washington, D.C., this 28th day of August, 2013.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman

Executive Secretary

[FR Doc. 2013-21357 Filed 09/03/2013 at 8:45 am; Publication Date: 09/04/2013]